

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRUNG TRAN,

No. C 06-4508 MHP (pr)

Petitioner,

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

v.

ROBERT A. HOREL, warden,

Respondent.

INTRODUCTION

Trung Tran filed this pro se action seeking a writ of habeas corpus under 28 U.S.C. § 2254. The matter is now before the court for consideration of the merits of the habeas petition. For the reasons discussed below, the petition will be denied.

BACKGROUND

The California Court of Appeal described the evidence in this home invasion robbery case:

Thao Thi Truong had been staying at a house on Dearwell Way in San Jose with her then boyfriend Tien Van Le for two nights prior to October 19, 2000. Late that night, there were nine persons in the house, including Lamyai Sae Eiw. Truong and Le were eating and watching television in the living room with three others when they heard somebody knock on the door. Le went to answer it, and a man put a gun to his head. The man covered part of his face with a cloth, and two other men came in with their faces covered. The taller of the two other men also had a gun. They yelled for everybody to sit down with their hands over their heads. Two men that had been in the house ran outside through the garage. The taller man who had come inside with a gun ran upstairs, threw down a suitcase, and yelled for its owner to unlock it. He also yelled, "Where's the money? If I can't find the money, then somebody is going to get shot."

[Tan Van] Nguyen and a women came from upstairs to the living room. The second robber told everybody in the living room to put their money on the table.

1 Everybody took out everything they had and put it on the floor or the table. Truong
2 gave up her earrings and two cell phones. Le gave up \$60 and his watch. Eiw gave
3 up a necklace and a watch. Nguyen gave up some money and keys. The third robber
4 got a rice bag from the kitchen, gathered everything from the floor and table, and put
5 it in the bag. The robber from upstairs came down yelling, "We're busted." All three
6 of them then ran toward the kitchen. Truong and Eiw heard a gunshot and everybody
7 in the house, including Nguyen, ran out the front door while the robbers ran out the
8 back. One police officer was already out in front and others arrived later.

9 Officer Toshi Hata responded to the Dearwell Way area shortly after midnight,
10 and was posted at an intersection about a block and a half away, near a park. Near
11 1:00 a.m., he observed Huynh walking toward a house. Hata made contact with
12 Huynh and noticed that he was carrying a black jacket and was sweating heavily,
13 disheveled, and had grass stains on his pants. Huynh said that he did not know
14 anybody in the house but was going there to borrow a telephone. Hata searched
15 Huynh for weapons, found none, and placed Huynh in his police car. Truong was
16 brought to Hata's location and identified Huynh as being one of the robbers. Gunshot
17 residue was later found on the right cuff of Huynh's jacket.

18 On October 20, 2000, the police contacted John T. at his school about the
19 robbery. John told officer Paul Joseph that Huynh, [Jimmy] Cun, and [petitioner,
20 Trung Vinh] Tran were involved with him in the robbery. At John's direction, Joseph
21 drove John to Tran's apartment, where there was a white Mitsubishi parked outside.
22 Tran was arrested shortly thereafter outside his apartment. Tran told Joseph that he
23 had been involved in the robbery. He said that he was familiar with the people who
24 lived at the house, and believed that illegal gambling went on there so that there
25 would be a lot of money. He drove to the house in his white Mitsubishi. He received
26 a call on his cell phone and then waited in his car. Sometime later he heard a gunshot
27 and drove away. He received another call on his cell phone, stopped in the area of
28 Highway 101 and Bernal, and then drove back to his apartment.

Cun was arrested the evening of October 20, 2000, after he left Nguyen's
residence. He admitted to Sergeant David Hober that he had been involved in the
robbery on Dearwell Way. He said that he went to the house in a white Mitsubishi.
He ran into the house with a gun and said, "Where's the money[?]" He went upstairs
where he found a man in the bathroom. He told the man to go sit with the others in
the living room. After the victims' belongings were put in a rice bag, he ran to a back
sliding glass door. A shot was fired and the door broke open. He ran out and jumped
two fences. The gun dropped out of his waistband and he threw his mask away. He
called somebody on one of the victims' cell phone, and a white Mitsubishi picked him
up in the area of Highway 85 and Bernal Road. Cun said that he got the scratches on
his forehead and his hand while running from the scene.

On November 3, 2000, Nguyen admitted to Sergeant Hober that he was at the
Dearwell Way address on October 19. He said that he had borrowed Le's cell phone
and made a telephone call approximately one-half hour before the robbery occurred.
Nguyen was arrested after the interview.

At trial, John admitted being a member of Asian Gangsters for two years prior
to October 19, 2000. On that date, he was 17 years old and was involved in the home
invasion robbery on Dearwell Way with defendants. Huynh and Cun are also
members of Asian Gangsters. John thought that Nguyen had been a member but that
he "got out" before the robbery. Tran was not a member. John testified that there
were about six members in the gang but there was no formal structure to the gang and
no specific leaders.

1 On that evening John went to Tran's apartment with defendants. There they
2 devised a plan to rob the Dearwell Way house. John understood that the house was a
3 place for prostitution and gambling. Nguyen was supposed to go into the house, call
4 Tran on his cell phone, and tell the rest of them how many people were inside. Tran
5 was to drive Huynh, Cun and John to the house and back afterwards. Huynh was to
6 run into the house and Cun and John were to follow him. They were to bring
7 everybody in the house to the living room.

8 Nguyen drove his car to the house. About ten or twenty minutes later, Tran
9 drove a white Mitsubishi to the house with the others. John found out from Huynh
10 and Cun while in the car that they were going to use guns. Tran received a call on his
11 cell phone. He asked how many people were in the house and then told the others in
12 the car how many people were there. Tran stayed in the car when Huynh went to
13 knock on the front door and Cun and John went to hide behind a bush. Cun and John
14 put on ski masks. When a man answered Huynh's knock, Huynh kicked the door and
15 rushed in. Huynh covered his face with a rag and pointed a gun at the man. Cun and
16 John rushed in after Huynh. John and Huynh ran to the living room and Cun ran
17 upstairs.

18 Cun brought Nguyen and a woman back downstairs to the living room. Cun
19 and Huynh told everybody at gunpoint to stay where they were. Nguyen was treated
20 as a victim. Cun went upstairs to search for items, and John went into the kitchen to
21 grab a bag. He took a rice bag back to the living room. Huynh told the victims to put
22 all their jewelry and money on the table. John picked up the
23 jewelry and cash and put it all in the bag.

24 Cun and Huynh yelled, "Let's go." They tried to leave through the back
25 sliding glass door but it would not open. Huynh fired his gun, shattering the glass.
26 Cun, Huynh, and John ran from the house through the door. They jumped over the
27 fence, went through another yard, and then jumped over a freeway wall. John and
28 Cun threw away the ski masks and Cun threw away the bag of property they had
taken. John lost sight of Huynh and did not see him again that night. John and Cun
ran along the freeway to an exit. Cun used a cell phone taken from one of the victims
and called Tran. Tran picked them up and took them home.

On October 19, 2000, the Dearwell Way residence had three couches, a table,
and a television set in the living room. There were mattresses on the floor and a
dining room table near the back sliding glass door. There were a bed or mattresses on
the floor and clothes hanging in the closets in the three bedrooms. There were a
washer, dryer, and laundry detergent boxes in the laundry room. Officers also found
suitcases, laundry baskets, and purses. A .380 spent casing was found on the rug next
to an overturned chair near the back door. A ski mask and a gun were found outside
the house. An unspent 9 mm round was found in the gun. DNA from saliva on the
ski mask matched Cun's DNA.

Sergeant Hober testified on behalf of Nguyen that he went to the Dearwell Way
address the afternoon of November 2, 2000. Le was there along with four Asian
females, one of whom was sitting on a couch in a towel. Three of the females had no
identification and did not provide Le with any kind of address. INS officers came and
took those three females with them. In Hober's opinion, the house was partially used
as a house of prostitution and the three women taken away did not live there. The
back sliding glass door of the house had not been repaired, and a mattress covered the
doorway. Hober saw KY jelly in a bedroom. He searched a car in the garage and
found Le's driver's license in it, with an address outside San Jose. In the trunk of the
car were approximately 500 condoms and three tubes of KY jelly.

Huynh testified in his own behalf that he knew that the Dearwell Way house was a “whorehouse” because he had been there before. On October 19, 2000, he was dropped off by a friend and was walking toward the house when he saw a police car and heard a shot. He then took off running and ended up in a park. He hid in some bushes, but later left to find a phone to call for a ride home. An officer stopped him as he was walking up to another house. Private investigator Kelly Whitney testified on behalf of Huynh that she photographed the Dearwell Way house on December 19, 2001. At the time, the house appeared uninhabited and the back sliding glass door was still broken.

Gang Evidence

The parties stipulated that Nguyen is a member of Asian Gangsters. San Jose Police Officer Jason Ta testified as an expert that Asian Gangsters and Kings of the Night are two of several Vietnamese gangs in the San Jose area. Vietnamese gangs are primarily involved in armed assaults on rival gang members. Asian Gangsters, which has about 20 members, are also involved in robberies. In Ta’s opinion, the home invasion robbery on October 19, 2000, was committed for the benefit of and in association with Asian Gangsters.

On May 21, 1999, at approximately 8:00 p.m., Officer Juan Ceballos received a report of a gun in a car at Oak Hill Cemetery. The individuals involved were visiting the grave of a recently deceased Asian Gangster. Ceballos field identified Huynh and Cun at the scene. At the time, Cun acknowledged membership in Asian Gangsters but Huynh did not.

Huynh was severely stabbed several times at the Café Quyen on January 14, 2000, after which Tran and two others took Huynh to the hospital for medical treatment. Police determined that several members of the Kings of the Night were involved in the stabbing. Kings of the Night and Asian Gangsters are rival gangs.

On May 4, 2000, John and Duy N., another member of Asian Gangsters, got into a fight with Vincent H. John had a sword with him that he intended to use, but did not. During the fight Vincent was slashed on the back with Duy’s sword. Although Vincent was not in a gang, John admitted that he and Duy were involved in other fights that involved other Vietnamese gangs.

Resp. Exh. F, California Court of Appeal Opinion in People v. John Ngoc Huynh, et al., (“Cal. Ct. App. Opinion”), pp. 2-8.

At a jury trial in 2002 in Santa Clara County Superior Court, Tran was convicted of three counts of robbery of an inhabited dwelling while acting in concert and three counts of false imprisonment. Cal. Penal Code §§ 213(a)(1)(A), 236. He also was found to have committed the offenses for the benefit of a street gang, Cal. Penal Code § 186.22(b)(1), and to have discharged a firearm in conjunction with the robbery charges, Cal. Penal Code § 12022.53(b) & (c). Tran was sentenced on July 2, 2002 to a total of 46 years to life in prison.

Tran appealed. His conviction was affirmed by the California Court of Appeal with a

1 sentence modification and his petition for review was denied by the California Supreme
2 Court. Tran filed unsuccessful state habeas petitions before filing this action.

3 Tran's federal habeas petition alleged six claims for relief: (1) the trial court violated
4 Tran's right to due process by refusing to instruct that a structure must be used as a sleeping
5 quarters with the intent to do so in the future in order to be an inhabited dwelling house, (2)
6 the conviction and sentence for the firearm charge (a) amounted to cruel and unusual
7 punishment and (b) were not supported by sufficient evidence, (3) the sentence enhancement
8 under California Penal Code § 12022.5 was not charged or proven, in violation of Tran's
9 right to due process, (4) trial counsel provided ineffective assistance in that he failed to
10 challenge the admissibility of Tran's alleged confession, failed to adequately investigate the
11 interrogation, and failed to file a motion to suppress, (5) trial counsel provided ineffective
12 assistance by pursuing a defense strategy of necessity instead of actual innocence and by
13 failing to adequately investigate before trial, (6) Tran's right to due process was violated
14 because his conviction was based on insufficient evidence in that witness John T.'s testimony
15 was not corroborated.

16 The court found the claims in the petition to be cognizable in a federal habeas action
17 and ordered respondent to show cause why the petition should not be granted. Respondent
18 filed an answer and Tran filed a traverse. The matter is ready for a decision on the merits of
19 the petition.

20 JURISDICTION AND VENUE

21 This court has subject matter jurisdiction over this habeas action for relief under 28
22 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged
23 conviction occurred in Santa Clara County, California, within this judicial district. 28 U.S.C.
24 §§ 84, 2241(d).

25 EXHAUSTION

26 Prisoners in state custody who wish to challenge collaterally in federal habeas
27 proceedings either the fact or length of their confinement are required first to exhaust state
28 judicial remedies, either on direct appeal or through collateral proceedings, by presenting the

1 highest state court available with a fair opportunity to rule on the merits of each and every
2 claim they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). State court remedies
3 were exhausted for the claims in the petition.

4 **STANDARD OF REVIEW**

5 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
6 custody pursuant to the judgment of a State court only on the ground that he is in custody in
7 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).
8 The petition may not be granted with respect to any claim that was adjudicated on the merits
9 in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that
10 was contrary to, or involved an unreasonable application of, clearly established Federal law,
11 as determined by the Supreme Court of the United States; or (2) resulted in a decision that
12 was based on an unreasonable determination of the facts in light of the evidence presented in
13 the State court proceeding." 28 U.S.C. § 2254(d).

14 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state
15 court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of
16 law or if the state court decides a case differently than [the] Court has on a set of materially
17 indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000).

18 "Under the 'unreasonable application' clause, a federal habeas court may grant the
19 writ if the state court identifies the correct governing legal principle from [the] Court's
20 decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at
21 413. "[A] federal habeas court may not issue the writ simply because that court concludes in
22 its independent judgment that the relevant state-court decision applied clearly established
23 federal law erroneously or incorrectly. Rather, that application must also be unreasonable."
24 Id. at 411. A federal habeas court making the "unreasonable application" inquiry should ask
25 whether the state court's application of clearly established federal law was "objectively
26 unreasonable." Id. at 409.

DISCUSSION

A Failure to Give Requested Jury Instruction on Inhabited Dwelling

Tran contends that his right to due process was violated by the trial court's refusal to give a pinpoint instruction requested by a co-defendant on the meaning of "inhabited dwelling house." He urges that, while the instruction given "was correct as far as it went, the trial court nonetheless should have also instructed the jury with the proposed instruction" offered by his co-defendant. Petition For Review, p. 13. That proposed instruction defined the term "inhabited dwelling house" as a place "a person with possessory rights uses . . . as sleeping quarters intending to continue to do so in the future." *Id.*; *see* RT 1147. The trial court refused to give this instruction.

Federal habeas relief is available when an erroneous jury instruction so infects the entire trial that the resulting conviction violates due process. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991). A defendant generally is entitled to have the jury instructed on his defense theory, but whether a constitutional violation has occurred in the failure to do so will depend on the evidence in the case and the overall instructions given to the jury. *See Duckett v. Godinez*, 67 F.3d 734, 745 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996). There must be some evidence to support the instruction in order for there to be a duty to instruct. *Id.* at 743.

Here, the trial court instructed the jury on the definition of robbery, and that every robbery of a person in an inhabited dwelling was first degree robbery. At the request of the prosecutor, the trial court also instructed, "[¶] 'Inhabited dwelling house' means [¶] A structure where people ordinarily live and; [¶] Which is currently being used for dwelling purposes. [¶] An inhabited dwelling house need not be the victim's regular or primary living quarters." Cal. Ct. App. Opinion at 8. This language was taken from *People v. Fond*, 71 Cal. App. 4th 127, 130 (1990) and was similar to the standard burglary instruction that defined an inhabited dwelling house. *See* CALJIC 14.52 ("An inhabited dwelling house is a structure which is currently used as a dwelling whether occupied or not. It is inhabited although the occupants are temporarily absent.")

1 The California Court of Appeal determined that the instruction that was given defined
2 “inhabited dwelling house” in a manner consistent with California law. Moreover, as the
3 state appellate court observed, the instruction requested by the defense was a misstatement of
4 California law:

5 In People v. Hughes (2002) 27 Cal. 4th 287, the defendant argued that there was
6 insufficient evidence that the victim’s apartment was an “inhabited dwelling” for
7 purposes of both first degree robbery and first degree burglary because the victim was
8 in the process of moving her possessions to her boyfriend’s home and had slept there
9 during the prior two weeks. (*Id.* at p. 354.) In rejecting this argument our Supreme
Court stated, “The use of a house as sleeping quarters is not determinative, but instead
is merely a circumstance used to determine whether a house is inhabited.” (*Ibid.*;
citing Hernandez, *supra*, 9 Cal. App. 4th at pp. 440-442.)

10 The instruction given in this case properly defined “inhabited dwelling house”
11 as a “structure where people ordinarily live and . . . which is currently being used for
12 dwelling purposes” (*Fond*, *supra*, 71 Cal. App. 4th at p. 130.) *Defendants’ requested*
13 *instruction would have grafted a “use as sleeping quarters” requirement onto the*
14 *definition of “inhabited dwelling house” for purposes of first degree robbery. There*
15 *is no such requirement, although defendants were free to argue that it was a*
16 *circumstance that the jury could consider.*

17 Cal. Ct. App. Opinion at 10 (emphasis added).

18 The state court’s interpretation of state law binds the federal court in a habeas corpus
19 action. Bradshaw v. Richey, 546 U.S. 74, 76 (2005); Hicks v. Feiock, 485 U.S. 624, 629
20 (1988). Because California law did not have the requirement that an inhabited dwelling be
21 used as sleeping quarters, it follows that there was no constitutional error in not instructing
22 that such a requirement existed. Tran thus fails show any error in the trial court’s instruction
of the jury, let alone an error that so infected the trial as to make it fundamentally unfair. The
state appellate court’s rejection of this claim was not contrary to, or an unreasonable
application of, clearly established Supreme Court authority.

23 B. Challenges To The Sufficiency Of the Evidence

24 Tran claims that the conviction and sentence for the firearm and gang charges were
25 not supported by sufficient evidence. He also claims that the evidence was insufficient
26 because it was based on an accomplice’s testimony.

27 Before turning to the federal constitutional claims, it is necessary to explain how
28 Tran’s 46-to-life sentence was calculated. Tran did not personally use a firearm during the

1 robbery, but has liability because one of the other principals did use a firearm. The normal
2 sentencing triad for a robbery of an inhabited dwelling while acting in concert is 3, 6 or 9
3 years in prison. Cal. Penal Code § 213(a)(1)(A). When that offense is committed "for the
4 benefit of, at the direction of, or in association with any criminal street gang, with the
5 specific intent to promote, further, or assist in any criminal conduct by gang members," the
6 specified term is an indeterminate term of life imprisonment. Cal. Penal Code §
7 186.22(b)(4)(B). When, as here, "the defendant is charged as a principal in the offense and
8 another principal discharges a firearm in the commission of the offense, the specified term is
9 an indeterminate life term with a minimum confinement time calculated by adding the
10 determinate term for the underlying conviction to 20 years." Cal. Ct. App. Opinion at 13,
11 citing Cal. Penal Code §§ 186.22(b)(4)(A), 12022.53(c) & (e)(1). For Tran, the court
12 selected the middle term of 6 years on the first degree robbery, and added 20 years to the
13 term, resulting in an indeterminate life sentence with a 26-year minimum. The court then
14 added a consecutive 20-year term under § 12022.53 for the use of the firearm by a principal.
15 See CT 1223-1224.

16 Tran argued on appeal that he could not receive enhancements under both California
17 Penal Code § 186.22 and § 12022.53. The state court of appeal determined that the § 186.22
18 provision was not a sentence "enhancement" under state law and therefore rejected Tran's
19 claim that he could not be subjected to both § 186.22 and § 12022.53. Cal. Ct. App. Opinion
20 at 14; see also Robert L. v. Superior Court, 30 Cal. 4th 894 (Cal. 2003) (§ 186.22(d) is an
21 alternate penalty provision and not a sentence enhancement or substantive offense). The
22 state court's interpretation of state law binds a federal court in a habeas corpus action.
23 Bradshaw v. Richey, 546 U.S. at 76; Hicks v. Feiock, 485 U.S. at 629. Therefore, this court
24 does not revisit the correctness of the sentence calculation, and instead moves on to consider
25 Tran's related claims about the sufficiency of the evidence to support the sentences imposed.

26 The Due Process Clause "protects the accused against conviction except upon proof
27 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
28 charged." In re Winship, 397 U.S. 358, 364 (1970). A federal court reviewing collaterally a

1 state court conviction does not determine whether it is satisfied that the evidence established
 2 guilt beyond a reasonable doubt, but rather determines whether, "after viewing the evidence
 3 in the light most favorable to the prosecution, any rational trier of fact could have found the
 4 essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S.
 5 307, 319 (1979); see Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992), cert. denied, 510 U.S.
 6 843 (1993). Only if no rational trier of fact could have found proof of guilt beyond a
 7 reasonable doubt may the writ be granted. See Jackson, 443 U.S. at 324; Payne, 982 F.2d at
 8 338. Under § 2254(d), a federal habeas court applies the standards of Jackson with an
 9 additional layer of deference. Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005), cert.
 10 denied, 546 U.S. 1137 (2006). Generally, a federal habeas court must ask whether the state
 11 court decision reflected an unreasonable application of Jackson and Winship to the facts of
 12 the case. Id. at 1275.

13 1. The Firearm Enhancement

14 There was sufficient evidence to support the firearm enhancement under § 12022.53.
 15 Section 12022.53(c) provides for a 20-year sentence enhancement for any person who
 16 "personally and intentionally discharges a firearm" in a robbery or other listed felony. The
 17 enhancement applies if it is pled and proven that the person violated § 186.22(b) and "[a]ny
 18 principal in the offense committed any act specified in subdivision (b), (c) or (d)." Cal. Penal
 19 Code § 12022.53(e)(1). Although Tran did not personally use a gun during the robbery, the
 20 interplay of subsections (c) and (e) of § 12022.53 caused the section to apply to him because
 21 he was a principal in the robbery and another principal (i.e., John Huynh) fired a gun during
 22 the course of the robbery.

23 The evidence was sufficient to establish that John Huynh personally and intentionally
 24 discharged a firearm during the robbery. John T. testified that the robbery started with John
 25 Huynh rushing in after the house door was opened; Huynh covered his face with a rag "and
 26 pointed the gun at the guy." RT 304. John T. also testified that as the robbers attempted to
 27 exit when they thought the police had arrived, a glass door wouldn't open and Huynh "fired
 28 the gun at the window, so it shattered." RT 315. During the investigation, the police found a

1 spent casing left over from a gun being shot near the broken window. RT 450. Since there
2 was sufficient evidence that co-principal Huynh personally and intentionally discharged a
3 firearm, co-principal Tran could be liable also under § 12022.53. The application of §
4 12022.53 to Tran did not offend due process.

5 This analysis also disposes of Tran's argument that he was denied his right to a jury
6 trial in that the "jury should have been able to consider the fact petitioner was never armed,
7 of [sic] in possession of a firearm." Petition, attachments (habeas petition in Cal. Supreme
8 Court, p. 14). His argument misunderstands the law vis-a-vis his liability: his personal
9 possession of a firearm was not necessary for the enhancement to apply and his liability was
10 based on Huynh's possession and use of a firearm, which the jury did find to be true. See CT
11 1076, 1106. Tran had no right to have the jury find a fact that was not necessary to the
12 imposition of enhancement.

13 2. The Gang Crime Sentence

14 Tran was sentenced under a gang crime statute that involves a harsh sentencing
15 scheme for a "person who is convicted of a felony committed for the benefit of, at the
16 direction of, or in association with any criminal street gang, with the specific intent to
17 promote, further, or assist in any criminal conduct by gang members." Cal. Penal Code §
18 186.22(b)(1); CALJIC 17.24.2; CT 1038. Specifically, Tran contends there was not enough
19 evidence that the Asian Gangsters were a criminal street gang as defined in § 186.22 or that
20 the crimes were done at the direction of or in association with a criminal street gang.

21 A "criminal street gang" was defined as meaning "any ongoing organization,
22 association, or group of three or more persons, whether formal or informal, (1) having as one
23 of its primary activities the commission of one or more of the following acts: assault with
24 deadly weapon, assault likely to produce great bodily injury, and robbery, (2) having a
25 common name or common identifying sign or symbol and (3) whose members individually
26 or collectively engage in or have engaged in a pattern of criminal activity." CT 1038;
27 CALJIC 17.24.2. The court also instructed the jury that either "prior conduct or acts
28 committed at the time of the charged offenses can be used to establish the 'primary activities'

1 element." CT 1041.

2 There was sufficient evidence that Asian Gangsters ("AG") was a criminal street gang.
3 San Jose police officer Jason Ta testified as an expert on Asian gangs and identified AG and
4 Kings of the Night as two of the local Vietnamese gangs. RT 887. Although it was informal
5 in nature and had no geographic boundaries or clubhouse, AG met the commonality
6 requirement in that it had a name, i.e., Asian Gangsters, and to a lesser extent had some
7 symbols in that some members other than Tran had AG tattooed on themselves and made "A"
8 and "G" hand signs. RT 965-966; see RT 361, 391. AG had more than the requisite three
9 members, as it had about 20-25 members (according to Ta), RT 898-899, or six members
10 (according to John T.), RT 325. AG also met the primary activities requirement, as there was
11 evidence of a May 2000 attack by two AG members with a sword on a rival gang member,
12 RT 890-891, during which the latter was slashed with the sword. That was identified by the
13 gang expert as a gang-related crime committed for the benefit of or in association with, or at
14 the direction of AG. See RT 891, 892. In addition to that sword incident, the current home
15 invasion robbery showed a pattern of criminal activity. The gang expert opined that
16 Vietnamese gangs in general were "the most brutal of gangs;" their assaults were typically
17 very serious assaults with machetes, knives or guns; and their assaults typically were directed
18 at rival gang members. RT 894. The gang expert then addressed AG in particular, i.e., that
19 its primary activities were "assaults, just primarily fighting." RT 895. The gang expert also
20 opined that AG also was involved in robberies. RT 896. Viewing the evidence in the light
21 most favorable to the prosecution, a rational trier of fact could have found beyond a
22 reasonable doubt that the primary activities requirement was met. Specifically, the trier of
23 fact rationally could have concluded that the AG's assaults were assaults with deadly
24 weapons or assaults likely to produce great bodily injury. Since AG was a Vietnamese gang,
25 the general statement that Vietnamese gangs were involved in brutal armed attacks on rival
26 gang members could be understood to modify the kind of assaults that AG did, such that a
27 rational trier of fact could conclude that AG members engaged in assaults with deadly
28 weapons and/or assaults likely to produce great bodily injury.

There also was sufficient evidence that the home invasion robbery was committed for the benefit of, at the direction of, or in association with AG. John T. testified that the crime was committed by a group that included three gang members (him, Huynh and Cun), a former member of AG (Tan Van Nguyen), and an associate of AG (Tran). RT 284-290, 903-904. John T. expected that they all would share the proceeds. RT 312. Officer Ta explained how the crime was committed for the benefit of and in association with AG. RT 905-906. According to him, AG would benefit monetarily and would gain status/reputation with other rival gangs and have an advantage in getting new members; also, AG's members who committed the crime would gain clout within the gang because they would be perceived as more "hard core." RT 905-908, 967-68. Officer Ta also opined that Tran committed this offense in association with AG. RT 913.

Respondent incorrectly asserts that both John T. and officer Ta identified Tran as a member of AG. Compare Resp. Memo. of P&As, p. 11 with RT 351, 903-904. Respondent's mistaken assertion does not affect the outcome, as it was not necessary that Tran be a member of AG to have the alternate penalty provision of § 186.22 applied to him.

3. Sufficiency Of The Evidence - Accomplice Testimony

Tran claims that his right to due process was violated because his conviction was based on insufficient evidence in that John T. was an accomplice and his testimony was not corroborated.

Under California law, a conviction may not be based on the testimony of an accomplice unless it is corroborated by other evidence connecting the defendant with the commission of crime. Cal. Evid. Code § 1111. Whether the evidence satisfied California Evidence Code § 1111 is largely beside the point here because a federal habeas court cannot grant relief based on a violation of state law. See Laboa v. Calderon, 224 F.3d 972, 979 (9th Cir. 2000); see also Estelle v. McGuire, 502 U.S. 62, 68 (1991); Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995). The federal due process standard is less stringent than California Evidence Code § 1111. Under federal law, "uncorroborated testimony of an accomplice is sufficient to sustain a conviction unless it is incredible or insubstantial on its face." United

1 States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (emphasis added). Indeed, the
2 U.S. Supreme Court recognized long ago that "there is no absolute rule of law preventing
3 convictions on the testimony of accomplices if juries believe them." Caminetti v. United
4 States, 242 U.S. 470, 495 (1917).

5 Basing Tran's conviction on uncorroborated testimony by John T. would have violated
6 federal due process only if John T. was shown to be an accomplice and his testimony was
7 incredible or insubstantial on its face. Tran comes nowhere close to showing that John T.'s
8 testimony was incredible or insubstantial.

9 Laboa identified a separate way a claim of constitutional dimension could exist: if the
10 state violated the defendant's due process right to fundamental fairness by arbitrarily
11 depriving him of a state law entitlement. Laboa, 224 F.3d at 979. Tran does not appear to
12 make such a claim, but even if he had raised it, he would not prevail. If corroboration was
13 constitutionally required for John T.'s testimony, it existed. John T.'s description of the
14 evening's events was corroborated by the following: John T.'s testimony about Tan Van
15 Nguyen going to the house ahead of the rest of the group to report back on the number of
16 people in the house was corroborated by Nguyen and Nguyen's car being found at the house.
17 John T.'s description of the robbery was corroborated by the statements the victims gave to
18 the police. John T.'s description of the gun shot being fired by John Huynh was corroborated
19 by the shell casing, the shattered window at the house, and the gun residue on Huynh's
20 clothes. John T.'s description of Tran driving them to the scene was, in a way corroborated
21 by the fact that no vehicle that had transported John T., Huynh and Cun was found at the
22 house and by the fact that they escaped without being apprehended even though police
23 arrived at the scene quickly. This evidence was sufficient corroboration because, although it
24 did "'not corroborate every fact to which the accomplice testified . . . it tend[ed] to connect
25 the defendant with the crime in such a way as to satisfy the jury that the accomplice [was]
26 telling the truth.'" Id., quoting People v. Fauber, 2 Cal. 4th 792 (Cal. 1992). And, of course,
27 Tran's own admissions to the police provided the strongest corroboration for John T.'s
28 statements. RT 673-675.

Tran has not shown that the state court's rejection of the federal constitutional claims in his challenges to the sufficiency of the evidence was contrary to or an unreasonable application of clearly established Supreme Court authority. The due process claims are denied.

C. Cruel And Unusual Punishment Claim

Tran contends his 46-to-life sentence amounts to cruel and unusual punishment. The nub of his argument appears to be that the sentence is excessive because he was only the driver and never entered the house or carried a gun.

A criminal sentence that is significantly disproportionate to the crime for which the defendant was convicted violates the Eighth Amendment's prohibition of cruel and unusual punishment. See Solem v. Helm, 463 U.S. 277, 303 (1983) (sentence of life imprisonment without possibility of parole for seventh nonviolent felony violates Eighth Amendment). "[O]utside the context of capital punishment, successful challenges to the proportionality of particular sentences will be exceedingly rare." Id. at 289-90 (citation and quotation marks omitted). "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime." Ewing v. California, 538 U.S. 11, 23 (2003) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)). Under this proportionality principle, the threshold determination for the court is whether petitioner's sentence is one of the rare cases in which a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality. Harmelin, 501 U.S. at 1005; Ewing, 539 U.S. at 30-31 (applying Harmelin standard). Only if such an inference arises does the court proceed to compare petitioner's sentence with sentences in the same and other jurisdictions. See Harmelin, 501 U.S. at 1005; cf. Ewing, 538 U.S. at 23. The threshold for an "inference of gross disproportionality" is quite high. See, e.g., Ewing, 538 U.S. at 30 (sentence of 25 years to life for conviction of grand theft with prior convictions was not grossly disproportionate); Lockyer v. Andrade, 538 U.S. 63 (2003) (upholding two consecutive 25-to-life terms for two convictions of theft of videotapes with prior convictions); Harmelin, 501 U.S. at 1008-09

1 (mandatory sentence of life without possibility of parole for first offense of possession of 672
2 grams of cocaine did not raise inference of gross disproportionality).

3 Andrade and Ewing are the Supreme Court's most recent pronouncements on Eighth
4 Amendment claims regarding prison sentences and both upheld California Three Strikes
5 sentences for shoplifters with prior convictions. Although these cases involved recidivist
6 criminal defendants, they apply to all prison sentences. One of the important lessons from
7 these two cases is that relief under the Eighth Amendment continues to be reserved for the
8 extreme and grossly disproportionate sentences.

9 Tran's argument that his involvement in the criminal episode was limited does not
10 help him. Under state law, he was a principal in the crime under California's familiar rule
11 that divides parties to a crime into principals and accessories. California treats all principals
12 as principals, regardless of whether they directly commit the act "or aid and abet in its
13 commission, or, not being present, have advised and encouraged its commission." Cal. Penal
14 Code § 31. Therefore, even if Tran's particular role in the crime required him to wait in the
15 car, Tran can be liable as a principal under state law. Further, although he endeavors in his
16 legal brief to minimize his role, the evidence shows that Tran was substantially involved in
17 the robbery: he took part in the planning discussions, drove the intruders to the victims'
18 house, relayed the information to the intruders from a phone call by a confederate in the
19 house informing them how many people were in the house, was to wait outside to drive the
20 get-away car, and did pick up two of the fleeing robbers after the robbery.

21 Tran's particular actions in this armed robbery generally are constitutionally irrelevant.
22 The Supreme Court has not held that a court must consider the defendant's individual
23 activities in a crime or any other mitigating factor in determining whether a prison sentence
24 is constitutionally permissible. Indeed, Supreme Court sentiment seems to be to the contrary.
25 A majority of the Harmelin court rejected the contention that the Eighth Amendment requires
26 a judge to consider mitigating factors before sentencing a convicted criminal to life
27 imprisonment without the possibility of parole, thereby declining to extend the
28 "individualized capital-sentencing doctrine" to non-capital cases. See Harmelin v. Michigan,

501 U.S. at 994-996; United States v. Gomez, 472 F.3d 671, 674 (9th Cir. 2006) (Harmelin does not apply to challenge to non-capital sentencing law); Alvarado v. Hill, 252 F.3d 1066, 1069 (9th Cir. 2001) (same). Tran's sentence is analyzed at the general level, i.e., whether 46-to-life is permissible for an armed robbery in a home in which a gun was used. That sentence for that crime does not amount to cruel and unusual punishment. His is not that "rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Ewing, 538 U.S. at 30 (quoting Harmelin, 501 U.S. at 1005). Tran is not entitled to the writ on his Eighth Amendment claim.

D. Sentence Enhancement Under Cal. Penal Code § 12022.5

Tran contended in his petition that the sentence enhancement under California Penal Code § 12022.5 was not charged or proven, in violation of his right to due process. Respondent argued that the state court of appeal had modified the sentence to address this concern. Tran conceded this issue in his traverse. Traverse, p. 15. The claim therefore is denied.

E. Ineffective Assistance of Counsel Claims

Tran claims that trial counsel provided ineffective assistance in that he failed to challenge the admissibility of Tran's alleged confession, failed to adequately investigate the confession, and failed to file a motion to suppress that confession. He also alleges that trial counsel provided ineffective assistance by pursuing a defense strategy of necessity instead of actual innocence and by failing to adequately investigate before trial.

The Sixth Amendment to the U.S. Constitution guarantees not only assistance, but effective assistance, of counsel. See Strickland v. Washington, 466 U.S. 668, 686 (1984). The purpose of the right is to ensure a fair trial, and the benchmark for judging any claim of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." See id. To prevail on an ineffective assistance of counsel claim, a habeas petitioner must show that (1) counsel's performance was "deficient," i.e., his "representation fell below an objective standard of reasonableness" under prevailing professional norms, id. at 687-88, and

1 (2) prejudice flowed from counsel's performance, i.e., that there is a reasonable probability
2 that, but for counsel's errors, the result of the proceedings would have been different, see id.
3 at 691-94.

4 Tran's first ineffective assistance claim concerns an alleged failure to take various
5 steps to challenge his confession to the police. The court did hold a hearing under California
6 Evidence Code to determine the admissibility of Detective Paul Joseph's report on Tran's
7 confession. RT 59-100. During that hearing, the attorneys inquired into the circumstances of
8 the interrogation and focused on whether Miranda warnings were given. During that hearing,
9 Tran's attorney elicited the following information from Detective Joseph: the detective did
10 not have Tran sign a written Miranda advisement form and had given the advisement orally,
11 RT 83-84; the detective had not videotaped or audiotaped the interview, RT 87; the detective
12 had made notes but destroyed them after he reduced the information to a report, RT 88; and
13 the detective had made reference in his report to a supplemental report by sergeant Pomeroy,
14 but did not have it and did not recall if he had read it, RT 90. After hearing the detective's
15 testimony at the § 402 hearing, the court granted the prosecutor's motion to admit the
16 statements and made the finding "that the Mirandas were properly given and that the
17 defendant freely, voluntarily, knowingly waived them." RT 100.

18 The trial court's determination that the Miranda warnings were properly given and that
19 Tran knowingly waived the Miranda rights is entitled to a presumption of correctness under
20 28 U.S.C. § 2254(d). See Thompson v. Keohane, 516 U.S. 99, 107-110 & n.9 (1995);
21 Derrick v. Peterson, 924 F.2d 813, 820-24 (9th Cir. 1990), cert. denied, 502 U.S. 853 (1991).
22 Tran's statement that he demanded counsel and remained silent does not overcome the
23 presumption of correctness. The trial court's determination of the voluntariness is not a
24 factual determination that is entitled to the presumption of correctness and instead is a mixed
25 question of law and fact requiring independent federal review, see Derrick, 924 F.2d at 921-
26 22, however, Tran has not challenged the voluntariness of his statement.

27 Tran faults his counsel for failing to challenge the confession by filing a motion to
28 suppress the confession but fails to show any prejudice. Even if his attorney did not file a

1 motion to suppress, the prosecutor filed a motion for a preliminary ruling that required the
2 court to decide the question of whether the confession was admissible – i.e., the same
3 question that would have been presented if defense counsel had moved to suppress the
4 confession. The court made a ruling adverse to Tran. Tran does not show how the trial
5 court's ruling on the admissibility of the confession would have changed had the
6 admissibility been challenged by a defense motion to suppress rather than a prosecution
7 motion to admit the confession. Cf. Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996), cert.
8 denied, 519 U.S. 1142 (1997) (failure to take futile action can never be deficient
9 performance). There also is no reasonable probability that, but for defense counsel's failure
10 to move to suppress the confession, the result of the proceedings would have been different.
11 Tran also faults counsel for failing to adequately investigate the circumstances of the
12 confession, but has not shown what information counsel would have found had he further
13 investigated the circumstances of the confession other than the information counsel did elicit
14 at the hearing regarding the lack of a signed waiver, the lack of a recording, the destruction
15 of the detective's original notes, and the doubt about the existence of a supplemental report
16 by sergeant Pomeroy referred to by the detective. Although these problems might have go
17 the weight to be given the confession or to the detective's credibility, they did not make his
18 report of Tran's confession inadmissible.

19 Tran also claims that counsel was ineffective for failing to investigate information
20 from Tran which would have demonstrated "he could not have possibly been involved in the
21 crime" due to two broken arms and a broken right hand that would have made it impossible
22 for him to drive a stick shift getaway car. He argues that counsel should have put on an
23 actual innocence defense based on that evidence. State habeas petition, p. 22. He has failed
24 to show deficient performance or resulting prejudice on this claim.

25 Tran's evidence is far from conclusive that he could not have been involved in the
26 crime. Assuming *arguendo* the medical records he submitted with his traverse are authentic,
27 they indicate that a week before the robbery he went to a San Jose hospital emergency room
28 for treatment after a motorcycle accident. He walked in several hours after the accident and

1 after noticing increasing pain in his elbows and right hand. He denied any other injuries.
2 The doctor's report stated that his exam found that Tran had a full range of motion in his
3 shoulders and wrists within normal range of motion, but Tran did have a swollen right elbow
4 from a right radial head fracture, abrasions on the palms of both hands, and a fractured fifth
5 metacarpal. The treatment plan included (1) a tetanus shot and pain medication, (2) cleaning
6 of the abrasions on his hands, (3) placement of a right upper extremity splint, and (4) follow
7 up with an orthopedic clinic. Traverse, Exhs. at A-29 - A-30. These records do not show an
8 injury so severe that they make a persuasive case of a person unable to drive a car a week
9 later. Tran argues that his car was a stick shift, but offers no evidence of that fact. Even
10 assuming his car had a stick shift, he does not establish that his elbow injury prevented him
11 from driving it a week after the splint was applied. Nor does he show how a broken pinkie
12 finger would preclude the operation of a car or a stick shift in a car. He also does not offer
13 any record from any third party (or even submit his own declaration) to show that he was
14 wearing a cast or splint or that his arm was immobilized a week after the hospital visit when
15 the robbery occurred or the next day when he was arrested. (For example, if an arrestee
16 arrived at jail with an arm in a splint or an arm that could not be handcuffed in normal
17 fashion, one would expect that there would be a jail intake record noting that.) In addition,
18 one must also bear in mind the extensive evidence contrary to Tran's argument that he was
19 unable to drive: a neighbor saw a white Mitsubishi speeding down the street at about the time
20 of the gunshot during the robbery, a white Mitsubishi (which apparently was Tran's car) was
21 found at Tran's home when he was arrested the next day, John T. identified Tran as the driver
22 in his confession to police the day after the robbery, Jimmy Cun identified Tran as the driver
23 in his confession to police, and Tran confessed to police that he was the driver. With this
24 state of the evidence, it can be said with certainty that there is no reasonable probability the
25 result of the proceedings would have been different if defense counsel presented an actual
26 innocence defense based on Tran's physical inability to drive the getaway car.

27 The state court's rejection of the ineffective assistance of counsel claims was not
28 contrary to or an unreasonable application of clearly established federal law, as determined


1 by the U.S. Supreme Court. Tran is not entitled to the writ.

2 **CONCLUSION**

3 The petition for writ of habeas corpus is DENIED on the merits. The clerk shall close
4 the file.

5 IT IS SO ORDERED.

6 DATED: September 24, 2008

7 
Marilyn Hall Patel
United States District Judge